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## BSM lwn. BAA & SATU LAGI

MAHKAMAH TINGGI MALAYA, TEMERLOH
ROSLAN MAT NOR PK
[SAMAN PEMULA NO: CB-24F-12-08-2022]
7 DISEMBER 2022

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**Abstrak** – *Tiada undang-undang khusus di Malaysia tentang bidang kuasa mahkamah untuk mengarahkan seseorang menjalankan ujian DNA demi penentuan nasab. Walaupun apa-apa prinsip undang-undang yang terpakai di United Kingdom boleh diguna pakai di Malaysia, tertakluk pada pematuhan ketat s. 3(1) Akta Undang-undang Sivil 1956, prinsip undang-undang keluarga dalam bidang kuasa lain berkaitan nasab tidak sesuai diguna pakai dalam sistem perundangan di Malaysia untuk memutuskan kes ini.*

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***UNDANG-UNDANG KELUARGA:*** *Kanak-kanak – Penentuan nasab – Permohonan agar kanak-kanak melalui ujian deoxyribonucleic acid ('DNA') – Sama ada mahkamah mempunyai bidang kuasa mengarahkan seseorang menjalankan ujian DNA untuk menentukan nasab – Sama ada prinsip undang-undang keluarga di United Kingdom boleh digunakan di Malaysia – Sama ada prinsip parens patriae wajar digunakan*

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Pemohon memohon perintah agar satu ujian deoxyribonucleic acid ('DNA') dilakukan terhadap tiga kanak-kanak untuk mengesahkan kesahtarafan tiga kanak-kanak tersebut dan sama ada ketiga-tiga mereka adalah zuriat responden pertama. Menyokong permohonannya, pemohon menyatakan bahawa (i) responden pertama bukan bapa kandung tiga kanak-kanak tersebut dan, sebaliknya, ketiga-tiga mereka anak hasil hubungan antara pemohon dan responden kedua; (ii) responden pertama mengetahui hal ini kerana pemohon pernah memperkenalkan responden kedua sebagai bapa kandung tiga kanak-kanak tersebut kepada responden pertama dan responden pertama tidak membantah; dan (iii) pertikaian status tiga kanak-kanak tersebut cuma timbul apabila pemohon dan responden pertama ingin bercerai. Walau bagaimanapun, petisyen penceraian ini telah ditarik balik. Isu teras yang berbangkit adalah sama ada tiga kanak-kanak tersebut wajar diperintahkan melakukan ujian DNA.

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**Diputuskan (menolak permohonan):**

**(1)** Tindakan pemohon dalam kes ini adalah semata-mata untuk ujian DNA oleh responden pertama. Tiada undang-undang khusus di Malaysia tentang bidang kuasa mahkamah untuk mengarahkan seseorang menjalankan ujian DNA untuk menentukan nasab. Tidak sesuai untuk mahkamah menggunakan bidang kuasa sedia ada untuk mengarahkan

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agar ujian DNA dibuat untuk tujuan penentuan nasab kerana tiada apa-apa prosiding yang ada seperti petisyen perceraian, perintah penjagaan atau lain-lain perintah yang melibatkan isu nasab. (perenggan 28 & 39)

**(2)** Apa-apa prinsip undang-undang yang terpakai di United Kingdom boleh digunakan di Malaysia. Ini bersesuaian dengan peruntukan bawah s. 3(1) Akta Undang-undang Sivil 1956. Walau bagaimanapun, peruntukan bawah undang-undang keluarga di United Kingdom, berkaitan kuasa mahkamah untuk memerintahkan ujian DNA untuk penentuan nasab, tidak boleh diguna pakai kerana tidak sesuai dengan keadaan dan adat resam di Malaysia. Pemakaiannya akan mengancam sistem undang-undang keluarga di Malaysia, sama ada Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 dan Enakmen Keluarga Islam di negeri-negeri. (perenggan 43 & 58)

**(3)** *Parens patriae*, satu doktrin yang diamalkan di England, tidak semestinya terpakai dalam bidang kuasa mahkamah di negara ini. Bidang kuasa *parens patriae* adalah berkaitan hak dan tanggungjawab pemerintah di England untuk memberi perlindungan pada kanak-kanak, orang yang tidak sempurna akal dan orang yang safih. Tidak sesuai untuk bidang kuasa *parens patriae* disamakan dengan bidang kuasa sedia ada mahkamah. Oleh itu, dalam kes ini, *parens patriae* tidak boleh dijadikan sandaran untuk satu perintah ujian DNA yang bertujuan demi penentuan nasab. (perenggan 42)

**Kes-kes yang dirujuk:**

*Ainan Mahamud v. Syed Abu Bakar Habib Yusoff; Puteh Kabariah Mohamud; Saudah Mahamud; Ratithan Mahamud; Sabariah Mahamud; Mat Sah [1938] 1 LNS 10 HC* ***(dirujuk)***

*Bertie v. Faulkland [1696] 23 ER 814* ***(dirujuk)***

*CAS v. MPPL & Anor [2019] 2 CLJ 454 CA* ***(dirujuk)***

*CAS v. MPPL & Anor [2022] 6 CLJ 713 HC* ***(dirujuk)***

*Choa Choon Neoh v. Spottiswoode [1869] 1 KY 216* ***(dirujuk)***

*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC* ***(dirujuk)***

*Hj Abdul Rahman v. Mohamed Hassan [1917] AC 209* ***(dirujuk)***

*JKL v. ABC & Anor [2022] 7 CLJ 376 HC* ***(dirujuk)***

*Khoo Hooi Leong Appellant; And Khoo Chong Yeok respondent. On Appeal From The Supreme Court Of The Straits Settlements (Penang) [1930] AC 346* ***(dirujuk)***

*Leonard v. Nachiappa Chetty [1923] 4 FMLSR 265* ***(dirujuk)***

*Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran Dan Kematian Malaysia, Jabatan Pendaftaran Negara, Malaysia & Anor [2022] 1 CLJ 23 FC* ***(dirujuk)***

*Mahisha Sulaiha Abdul Majeed v. Ketua Pengarah Pendaftaran & Ors And Another Appeal [2022] 8 CLJ 697 CA* ***(dirujuk)***

*Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC* ***(dirujuk)***

*Mr Justice Eyre v. Countess of Shaftsbury [1722] 24 ER 659* ***(dirujuk)***

*Nepline Sdn Bhd v. Jones Lang Wootton [1995] 1 CLJ 865 HC* ***(dirujuk)***

*Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC* ***(dirujuk)***
*Re E (Parental Responsibility: Blood Tests) [1995] 1 FLR 392* ***(dirujuk)***
*Re F (A Minor) (Blood Tests: Parental Rights) [1993] 3 All ER 596* ***(dirujuk)***
*S v. S [1970] 3 All ER 107* ***(dirujuk)***
*Spencer v. Anderson And Others [2017] 2 All ER 846* ***(dirujuk)***
*Spencer v. Spencer And Others [2018] 3 WLR 972* ***(dirujuk)***
*Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors [1990] 1 LNS 80 HC* ***(dirujuk)***
*Viscount Falkland v. Bertie And Others [1558-1774] All ER Rep 396* ***(dirujuk)***
*Yeap Cheah Neo And Others Appellants; And Ong Cheng Neo respondents. On Appeal From The Supreme Court Of The Straits Settlement, In Its Division Of Penang (1875) LR 6 PC 381* ***(dirujuk)***

**Perundangan yang dirujuk:**
Births And Deaths Registration Act 1957, ss. 7, 13, 13A
Civil Law Act 1956, ss. 3(1), 5, 6
Criminal Procedure Code, s. 5
Evidence Act 1950, ss. 4(3), 112
Family Law Act 1987, s. 23
Islamic Family Law Enactment 2005 (State of Pahang), s. 111
Law Reform (Marriage And Divorce) Act 1976, s. 47
Rules Of Court 2012, O. 14A, O. 28 r. 8
Family Law Act 1986 [UK], s. 55A
Family Law Reform Act 1987 [UK], s. 23

**Sumber-sumber yang dirujuk:**
*The Inherent Jurisdiction of the Court,* IH Jacob, Current Legal Problem [1970] 23, halaman 24
*Professor Ahmad Ibrahim,* The Civil Law Ordinance in Malaysia [1971] 2 MLJ Iviii

*Bagi pihak pemohon - Bhama Baskaran & Thomas Jayaraj; T/n Thomas Jayaraj & Co*
*Bagi pihak responden-responden - Shahida Nadzirah; T/n Yau & Co*

*Dilaporkan oleh Najib Tamby*

## PENGHAKIMAN

### Roslan Mat Nor PK:

### Pendahuluan

**[1]** Ini adalah permohonan daripada pihak pemohon isteri untuk suatu perintah supaya ujian DNA dilakukan terhadap ketiga-tiga orang kanak-kanak. Ia dilakukan bagi tujuan untuk mengesahkan kesahtarafan kanak-kanak tersebut sama ada ianya adalah merupakan zuriat kepada responden pertama. Responden kedua pula memohon supaya mahkamah mengisytiharkan bahawa beliau adalah bapa kandung kepada kanak-kanak tersebut dan bukannya responden pertama.

**[2]** Di samping itu, pemohon juga memohon agar kanak-kanak tersebut diletakkan di bawah jagaan dan kawalan pemohon sehingga keputusan ujian DNA tersebut diperolehi dan kedudukan kanak-kanak tersebut sudah diperolehi sama ada ianya berkaitan dengan responden pertama atau sebaliknya.

**Isu Utama**

**[3]** Isu dalam kes ini sama ada mahkamah wajar mengarahkan atau memerintahkan kanak-kanak tersebut melakukan ujian DNA.

**[4]** Pemohon dalam afidavit sokongannya menyatakan bahawa responden pertama bukannya merupakan bapa kandung kepada kanak-kanak yang berada di dalam rumah perkahwinan pemohon dan responden pertama. Sebaliknya, ia adalah merupakan anak hasil perhubungan di antara pemohon dan responden kedua.

**[5]** Pemohon menyatakan fakta ini telah diketahui oleh pihak responden pertama. Malahan, pemohon juga pernah memperkenalkan responden kedua sebagai bapa kandung kepada kanak-kanak tersebut kepada responden pertama dan tiada sebarang bantahan daripada pihak responden pertama.

**[6]** Walau bagaimanapun telah berlaku pergolakan dalam keluarga responden pertama dan pemohon sehingga menjurus kepada satu petisyen perceraian difailkan. Di dalam petisyen perceraian tersebut, salah satu yang dipohon adalah berkenaan dengan hak penjagaan kanak-kanak tersebut. Di sinilah bermulanya pertikaian berkenaan dengan status kanak-kanak tersebut sama ada ianya adalah merupakan zuriat kepada responden pertama atau sebaliknya. Peguam pemohon memaklumkan bahawa petisyen perceraian telah ditarik balik oleh pemohon.

**Analisa**

*Anggapan Sah Taraf Dan Nasab*

**[7]** Jika diteliti kepada takrifan anak di dalam perkahwinan bagi tujuan Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 telah menyatakan seperti berikut:

> "child of the marriage" means a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption;

**[8]** Pada masa yang sama mahkamah perlu merujuk kepada s. 112 Akta Keterangan 1950 yang memberikan anggapan bahawa seseorang kanak-kanak yang lahir semasa tempoh suatu perkahwinan ia adalah satu bukti konklusif berkenaan kesahtarafannya. Seksyen 112 Akta Keterangan 1950 menyatakan seperti berikut:

**112 Birth during marriage conclusive proof of legitimacy**

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

**[9]** Mahkamah merujuk kepada kes *Ainan Mahamud v. Syed Abu Bakar Habib Yusoff; Puteh Kabariah Mohamud; Saudah Mahamud; Ratithan Mahamud; Sabariah Mahamud; Mat Sah* [1938] 1 LNS 10; [1939] 1 MLJ 209 yang membincangkan berkenaan s. 112 Akta Keterangan 1950 tersebut di mana Hakim Aitken menyatakan berkenaan pemakaian s. 112 Akta tersebut seperti berikut:

Section 112 of the Evidence Enactment reads as follows:

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

This section, following the English Law, adopts the period of birth, as distinguished from conception, as the turning point in all questions of legitimacy. Birth within either period specified in the section is "conclusive proof" of legitimacy, unless it can be shown that there was non-access. That is the only way in which the presumption created by this section can be rebutted, and those who seek to rebut the presumption must prove that sexual intercourse between the parties did not take place at any time when, by such intercourse, the husband could, according to the ordinary course of nature, be the father of the child.

**[10]** Seksyen 7 Births And Deaths Registration Act 1957 menyatakan seperti berikut:

7 Particulars of births to be registered

(1) Subject to the provisions of this Part, the birth of every child born in Malaysia shall be registered by the Registrar in any registration area by entering in a register such particulars concerning the birth as may be prescribed; and different registers shall be used and different particulars may be prescribed for live-births and still-births respectively:

Provided that, where a living child is found exposed and no information as to the place of birth is available, the birth shall be registered by the Registrar for the registration area in which the child is found.

(2) The following persons shall be qualified to give information concerning a birth, that is to say:

(a) the father of the child;

(b) the mother of the child;

(c) the occupier of the house in which the child was to the knowledge of that occupier born;

(d) any person present at the birth; and

(e) any person having charge of the child.

**[11]** Pada masa yang sama mahkamah juga merujuk kepada ss. 13 dan 13A Births And Deaths Registration Act 1957 seperti berikut:

13 Provisions as to father of illegitimate child

Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

13A Surname of child

(1) The surname, if any, to be entered in respect of a legitimate child shall ordinarily be the surname, if any, of the father.

(2) The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided that where the person acknowledging himself to be the father of the child in accordance with the provisions of section 13 request so, the surname may be the surname of that person.

**[12]** Ini menunjukkan bahawa terdapat maksud yang berbeza kepada anak di bawah Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976, anggapan di bawah s. 112 Akta Keterangan 1950 dan ss. 13 dan 13A Births And Deaths Registration Act 1957 bagi anak-anak yang tidak sah taraf.

**[13]** Persoalannya ialah adakah anggapan di bawah s. 112 Akta Keterangan 1950 itu adalah sesuatu yang konklusif dan menyebabkan tiada lagi keterangan boleh dikemukakan bagi menyanggah anggapan bahawa anak yang lahir daripada perkahwinan yang sah adalah merupakan anak yang sah taraf.

**[14]** Mahkamah merujuk kepada s. 4(3) Akta Keterangan 1950 yang menyatakan seperti berikut:

4 Presumption

(3) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

**[15]** Namun demikian Mahkamah Rayuan di dalam kes *CAS v. MPPL & Anor* [2019] 2 CLJ 454 semasa menimbangkan rayuan keputusan Mahkamah Tinggi yang menolak permohonan untuk ujian DNA bagi tujuan penentuan nasab dan konteksnya kesahtarafan di bawah s. 112 Akta Keterangan 1950 telah menyatakan bahawa nasab dan kesahtarafan adalah suatu isu yang berbeza. Nasab adalah persoalan fakta sementara kesahtarafan adalah persoalan undang-undang. Oleh itu s. 112 Akta Keterangan 1950 hanya berkaitan dengan kesahtarafan dan ia tidak menghalang pertanyaan berkenaan nasab. Ini dinyatakan oleh Mahkamah Rayuan seperti berikut:

> [42] We began this judgment by identifying one issue of primary concern. We summarise our judgment as follows:
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> (i) The High Court erred in summarily dismissing the plaintiff's claim solely on its limited construction of s. 112 of the EA without attempting to consider the factual disputes patently clear on the face of the opposing affidavits. This in itself, rendered the application for disposal under O. 14A of the ROC untenable. The learned judge failed to recognise that the said s. 112 ought to have been construed in the context of the factual matrix after a determination of the factual disputes. Her Ladyship's failure to do so effectively meant that s. 112 of the EA was construed *in vacuo*.
>
> (ii) 'Paternity' and 'legitimacy' are separate issues. Paternity is a question of fact whereas legitimacy is a question of law. Section 112 of the EA only concerns legitimacy. It does not bar enquiries into paternity.
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> (iii) In a suit where only paternity and not legitimacy is in issue, the law conclusively presumes that the child whose paternity is in question is the legitimate child of the man to whom the mother was lawfully married at the time of the said child's birth. The 'access' proviso to s. 112 of the EA is only invoked if the child's legitimacy is challenged.
>
> (iv) In determining whether a paternity test ought to be ordered, the court must have regard to the best interests of the child. 'Best interests' here refers to the right of the child to know who his or her biological parents are. The court ought not to be concerned solely or wholly with fears of 'illegitimising the child'. When the factual disputes have been determined, the trial court can then go on to balance the competing interests of paternity and legitimacy and arrive at a fair and just determination of the matter. As matters stand, the plaintiff has been effectively deprived of the right to be heard fully.
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> (v) It remains incumbent on the High Court to decide whether or not to order a DNA test based on its construction of the law an in the context of the factual dispute before it.

**[16]** Di dalam kes tersebut, terdapat permohonan daripada plaintif sama ada beliau adalah bapa kandung kepada seorang kanak-kanak. Di dalam kes tersebut, Mahkamah Rayuan telah menyatakan bahawa Hakim Mahkamah Tinggi telah terkhilaf apabila tidak menimbangkan isu ataupun persoalan undang-undang di bawah A. 14A Kaedah-kaedah Mahkamah (KKM) 2012 dan telah memerintahkan kes itu dikembalikan kepada Mahkamah Tinggi untuk keputusan permohonan tersebut dan menukarkan saman pemula kepada writ di bawah A. 28 k 8 KKM 2012. Apa yang menarik dalam kes tersebut ialah pandangan Mahkamah Rayuan berkenaan sama ada Mahkamah Tinggi mempunyai bidang kuasa sedia ada untuk digunakan bagi tujuan perintah pemeriksaan DNA. Ini dapat dilihat di ayat akhir perenggan 41 seperti berikut:

> [41] In this vein, we ordered that encl. 5 be remitted to the High Court and be converted into a writ action. We did so in accordance with O. 1A, O. 2 r. 1, O. 28 r. 8 and O. 92 r. 4 of the ROC 2012. In this way, parties may fully ventilate all issues. If at all precedent is needed, we refer to the decision of the Court of Appeal in Lee Lai Cheng No. 2 (*supra* at para. 62) where this court remitted the O. 14A application to the High Court for trial. **This stood independently from the point as to whether our courts are empowered to order DNA tests under their inherent jurisdiction.** (penekanan ditambah)

**[17]** Mahkamah Tinggi Malaya di Kuala Lumpur dalam kes *CAS v. MPPL & Anor* [2022] 6 CLJ 713 telah memutuskan bahawa permohonan untuk ujian DNA bagi tujuan nasab dibenarkan demi memastikan kepentingan kanak-kanak tersebut dipelihara. Fakta bahawa kanak-kanak tersebut telah pun dipelihara oleh pihak defendan dengan mempercayai dan mengetahui bahawa defendan adalah bapanya adalah suatu yang tidak boleh dipertimbangkan sebagai alasan untuk tidak membenarkan permohonan ujian DNA tersebut.

> [304] In this instant case, there are no strong reasons to the contrary as to why the child should not undertake the DNA test. I find that the defendants' counsel's argument that "the child was raised and brought up by the defendants knowing the defendants to be her biological parents" is not a strong enough reason as to why the child should not undertake a DNA test to determine her paternity.
>
> [305] Based on the first defendant's admission to sexual relations with the plaintiff and this court's findings of fact that the plaintiff has made a *prima facie* case that he had sexual intercourse with the first defendant during the child's conception, I disagree with the defendants' counsel's submission that the dispute as regards the child's paternity "has been built purely on speculative assertions". The first defendant had admitted to sexual relations with the plaintiff from 2005 to 2014. She only denies sexual relations with him during the months of August, September and October 2007, which for the reasons discussed above, this court has found to be untrue.

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[306] Accordingly, based on these reasons, I am of the opinion that it is in the child's best interest to undergo a DNA test to determine her paternity. Hence, I find that this court ought to make an order for child C to undergo a DNA test to determine her paternity.

[307] Nevertheless, if the DNA test results show that the plaintiff is child
B C's biological father, in my view, it would be in the child's best interest and welfare that the plaintiff be reintroduced to her gradually and under the guidance and advice of a qualified child psychologist with experience in the disclosure of the biological origins/parents of children.

**[18]** Pada masa yang sama di dalam kes tersebut juga Mahkamah Tinggi
C memutuskan bahawa mahkamah mempunyai bidang kuasa untuk menggunakan bidang kuasa sedia ada bagi memerintahkan pemeriksaan ujian DNA tersebut. Hakim Mahkamah Tinggi telah memberi pandangan seperti berikut:

[262] Learned counsel for the defendants also did not bring this court's
D attention to the recent English case of *Spencer v. Spencer And Others* [2016] EWHC 851 (Fam); [2016] Fam 391 ("*Spencer v. Spencer*"). In that case, the High Court of England and Wales had made an order under its inherent jurisdiction directing that the extracted DNA sample of a deceased person be tested posthumously to determine paternity. In that case, the applicant had applied under s. 20 of the FLRA 1969 for an order for the testing
E of the deceased's DNA sample held by a hospital, alongside the applicant's own DNA to establish whether the deceased was his father.

[263] Whilst there is legislation in the UK that enables the courts to give directions for DNA tests by extracting bodily samples from living persons, in civil proceedings relating to paternity, there is no legislation relating to
F paternity testing using extracted DNA. Its common ground that the FLRA 1969 does not provide any statutory provision for a court to direct the post-humous testing of a deceased's DNA sample. Thus, the question before the High Court in *Spencer v. Spencer* was whether the courts' inherent jurisdiction could be used to fill the legislative void.

[264] Peter Jackson J (as he then was) in *Spencer v. Spencer* held that the
G application for the DNA test on a deceased person's DNA sample is outside the scope of s. 20 of the FLRA 1969 – the section only applied to DNA tests and the taking of DNA samples of living persons. He held that in cases where the absence of remedy would lead to injustice, the inherent jurisdiction of the High Court empowered the court to make the
H order for the DNA testing of a deceased's DNA samples in order to determine paternity.

[265] peal by the respondent, the English Court of Appeal upheld the High Court's order: see *Anderson v. Spencer* [2018] EWCA Civ 100 ("*Anderson v. Spencer*"). The Court of Appeal held that the High Court Judge had not fallen into error in finding that he had the power to make such an order
I pursuant to the High Court's inherent jurisdiction. It held that the judge had been right to hold that such a direction for the DNA test could be made under the court's inherent jurisdiction, even though it fell outside

the scope of s. 20 of the FLRA 1969. The Court of Appeal agreed that in order for an extension of inherent jurisdiction to be principled, it was not necessary to slot such extension of jurisdiction into a "previously recognised category." It held that "to do so would constrain the legitimate use of Lord Donaldson's great safety net". King LJ held that the High Court Judge was sensible of the need to avoid any unprincipled extension of the jurisdiction saying:

> 71(1) there is a legislative void, both in relation to *post-mortem* paternity testing and in relation to paternity testing using extracted DNA. I accept that in an area of this kind, policy considerations arise which would be better regulated by Parliament than by individual decisions of the court. In one sense, this speaks for judicial reticence. However, there is no indication that Parliament has turned its attention to the situation that arises in the present case, or that it is likely to do so at any early date. That gives rise to the possibility of an indefinite period during which individuals would be left without a remedy.

[266] Similarly, in India, the Supreme Court of India had held that the Indian courts may invoke their inherent power to direct and enforce orders for parties to undergo DNA tests in paternity cases see *Sharda v. Dharmpal* (2003) 4 SCC 493; *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another* (2010) 8 SCC 633.

[267] Section 151 of India's Code of Civil Procedure 1908 is in *pari materia* with O. 92 r. 4 of our Rules of Court 2012. It states:

> 151. Saving of inherent powers of court – Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

[268] The Supreme Court of India in *Sharda v. Dharmpal* (2003) 4 SCC 493 had reviewed its earlier decision in *Goutam Kundu v. State of West Bengal* [1993] SC 2295 and held:

> 39. *Goutam Kundu* is, therefore, not an authority for the proposition that under no circumstances the court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such order. In some otherjurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child.

[269] In the latter case of *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another* (2010) 8 SCC 633, the Supreme Court of India clarified that there is no conflict between its decisions in *Goutam Kundu* and *Sharda v. Dharmpal*, where it said:

> 23. There is no conflict in the two decisions of this court, namely, *Goutam Kundu* and *Sharda*. In Goutam Kundu it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry;

A there must be strong *prima facie* case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong *prima facie* case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong *prima facie* case is made out for such a course.

[270] The Indian courts' powers to order a DNA test to determine paternity was succinctly summarised by the Madras High Court in *Selvi Vijayalakshmi v. A Sankaran And Another* [2017] 4 MLJ (Madras Law Journal) 463 as follows:

> 33. Now, what follows from the above analysis of the ratios laid down in *Goutam Kundu v. State of West Bengal* (*supra*) and in *Sharda v. Dharmpal* (*supra*) is that it is not that the courts have no power to order DNA test. It can order, but it cannot be a routine matter because it involves personal freedom of an individual. Only in rare cases and real cases such a test can be ordered, provided there is a *prima facie* case for ordering such a test. (See *Bommi and Another v. Manirathanam* (*supra*).

[271] The common thread of the Indian and English authorities cited above, is that courts have the power to use their inherent jurisdiction to fill legislative voids.

[272] In India, its Supreme Court has held that the courts have the power pursuant to their inherent jurisdiction to order DNA testing on a child to determine the child's paternity.

[273] Whilst in England, prior to the enactment of s. 20 of the FLRA 1969, the Court of Appeal had held that the High Court as *parens patriae* has the power under its inherent jurisdiction to order a blood test on a child to determine the child's paternity. And after the enactment of the FLRA 1969, the English Court of Appeal in *Anderson v. Spencer* (*supra*) held that the High Court may use its inherent jurisdiction, in the interest of justice, to direct DNA testing to provide evidence of paternity in circumstances falling outside the scope of its FLRA 1969.

[274] In Malaysia, art. 160(2) of our Federal Constitution defines "law" to include:

> written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

[275] "Common law" is defined in s. 3 of the Interpretation Acts 1948 and 1967 as "the common law of England." In *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 AMR 563; [2006] 2 MLJ 389, FC, Abdul Hamid Mohamad FCJ (as he then was) held:

> Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia.

[276] The orders for a blood test on a child to determine the child's paternity by the English Court of Appeal in *In Re L (An Infant) and B (BR) v. B(J)* (*supra*), were made pursuant to a long existing English common law principle that the courts have the inherent jurisdiction as *parens patriae* to make whatever order it deems appropriate in the best interest and welfare of a child. Lord Denning MR held that pursuant to this common law principle that the courts as *parens patriae* have the power to order a child in custody cases and in paternity cases to undergo a blood test to determine the child's paternity: see paras. [257] and [261] above.

[277] In *In Re L (An Infant)* Lord Denning had cited Lord Cottenham LC's judgment in *In re Spence* (1847) 2 Ph 247, where it was held that the old Court of Chancery had the power to interfere for the protection of an infant, by virtue of the prerogative which belongs to the Crown as *parens patriae*, by making whatever order as might be appropriate.

[278] It is clear from Lord Cottenham LC's judgment in In re Spence in 1847, as applied 120 years later by Lord Denning MR in *In Re L (An Infant) and B(BR) v. B(J)* that the common law of England on 7 April 1956 empowers the courts as *parens patriae* to make any order as may be appropriate for the best interest and welfare of a child.

[279] Therefore, I have to respectfully disagree with learned counsel for the defendants' submission that there was no common law of England as administered in England on 7 April 1956 empowering the courts to order a blood test on a child to determine paternity. I find that based on the English common law as administered in England on 7 April 1956, the High Court in Malaysia has the jurisdiction to order a blood test – and with the advances of science, a DNA test – on a child to determine the child's paternity.

[280] The Federal Court in *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; [2019] 12 MLJ 1; [2019] 8 AMR 325, held that common law is law as long it remains in force and that the mechanism for determining of whether it remains in force lies in s. 3(1) of the Civil Law Act 1956 ("CLA 1956"). Section 3(1) of the CLA 1956 reads as follows:

> 3. Application of UK common law, rules or equity and certain statutes
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall:
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;

A

...

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such
B qualifications as local circumstances render necessary.

The Federal Court held that the common law is applicable in Malaysia, subject to the proviso in s. 3(1) of the CLA 1956, unless the common law has been modified, varied or abrogated by written law.

C [281] There are presently no written laws in Malaysia governing the power of the courts to order a DNA test on children in civil proceedings. Thus, it follows that there are no written laws in force in Malaysia that has modified, varied or abrogated the common law of England on this issue.

[282] Accordingly, based on the common law of England and under
D s. 3(1) of the CLA 1956, the courts in Malaysia pursuant to its inherent jurisdiction as *parens patriae* has the power to order that a child undergo a DNA test in order to determine the child's paternity.

[283] Even if the common law of England was not in force in Malaysia by reason of s. 3(1) of the CLA 1956, the case laws of England and India on the subject are of persuasive authority in Malaysia. The Supreme
E Court of India in *Sharda v. Dharmpal* (*supra*), *Goutam Kundu* (*supra*) and *Bhabani Prasad Jena* (*supra*) and the English Court of Appeal in *In Re L (An Infant)* (*supra*) and in *B (BR) v. B(J)* (*supra*) have all held that the courts have the power to make an order for a child to undergo a DNA test or blood test to determine his or her paternity.

F [284] Additionally, the Court of Appeal in the recent case of *Stone World Sdn Bhd v. Engareh (M) Sdn Bhd* [2020] 4 CLJ 354; [2019] AMEJ 1483 ("*Stone World v. Engareh*") had held that courts may extend its inherent jurisdiction "to any instance which requires its intervention in the absence of precise statutory regulation, or where injustice or abuse might otherwise result." Zabariah Mohd Yusof JCA (as she then was) held:

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> [62] It is to be noted that O. 92 r. 4 ROC is merely a declaratory provision which declares that the Rules do not limit or affect the inherent powers of the High Court. A reminder of the existence of such inherent power was further provided under r. 4. These inherent powers of the court are intrinsic to a superior court in
> H order to facilitate the proper functioning of it as a court of law. "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such limited jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted
> I thwarting of its process." (*Connelly v. DPP* [1964] AC 1254 at 1301).

> [63] Inherent powers of the court are separate and distinct source of jurisdiction from statutory powers of the court. They are residuary and reserve source of power. The inherent powers of the court are in addition to the powers specifically conferred by the rules on the court. They are complementary to those powers. The court is free to exercise them towards the ends of justice or to prevent the abuse of the process of the court. Thus it can be exercised cumulatively and concurrently with other sources of power. It is part of procedural law, not substantive law. It is invoked in relation to the process of litigation ... Their application depends on the circumstances of the case. The significance of the doctrine of inherent jurisdiction lay in its flexibility, for the court can extend it to any instance which requires its intervention in the absence of precise statutory regulation, or where injustice or abuse might otherwise result. It should be exercised judiciously and should not be circumscribed by rigid criteria or tests. (*Wee Soon Kim Anthony v. The Law Society of Singapore* (Unreported; Civil Appeal No 6000 of 2001) (Wee Soon Kim Anthony). It must not be applied indiscriminately (See *Malaysian Civil Procedure 2018* vol. 1 p. 1246).
>
> [285] Therefore, premised on the Court of Appeal's decision in *Stone World v. Engareh*, in the absence of any statutory or common law power to order a DNA test, the courts nonetheless have the inherent power as *parens patriae* to order the taking of DNA tests on a child to determine paternity.
>
> [286] Accordingly, even if the English common law as administered in England on 7 April 1956 does not provide the English courts with the jurisdiction to order a blood test on a child to determine paternity, and even if the laws of India and England are not of persuasive authority, the courts in Malaysia may extend its inherent jurisdiction as *parens patriae* to fill in the legislative void to order a DNA test on a child to determine his or her paternity.

**[19]** Ini juga diputuskan oleh Mahkamah Tinggi Shah Alam dalam kes *JKL v. ABC & Anor* [2022] 7 CLJ 376. Fakta dalam kes tersebut adalah seorang lelaki telah memohon supaya DNA tersebut dibuat bagi membuktikan bahawa beliau adalah bapa kandung kepada seorang kanak-kanak. Fakta dalam kes tersebut telah dinyatakan seperti berikut:

> [3] The child's biological mother, an unmarried mother, gave birth to the child on 2 February 2016. The plaintiff was present at the hospital and was allowed to see the child, but the next day, the biological mother got herself discharged and left with the child without informing the plaintiff.
>
> [4] The plaintiff tried to reach her on her handphone, but to no avail. However, on 12 February 2016, the biological mother phoned and informed him that she had given up the child for adoption but refused to divulge any further details. Thereupon, the plaintiff started to look for the child.

A [5] In the meantime, on 30 March 2016, the defendants applied to the Shah Alam Sessions Court and obtained an interim adoption order to adopt the child. They formally adopted the child on 17 June 2016. Sometime in October 2016, the defendants became aware of the plaintiff's existence when he posted on social media that he was looking for the child and that he was the biological father.

B [6] In early 2017, the plaintiff found out about the adoption order after conducting a search on the court file in the Shah Alam Sessions Court. He then appointed solicitors who filed an application to set aside the adoption order, but the same was subsequently withdrawn.

C [7] The plaintiff continued to post publicly claiming to be the father of the child. This prompted the defendants to institute proceedings against him in the Shah Alam High Court BA-22F-3-11-2019 ("the writ action") for *inter alia*, defamation and harassment.

D [8] The plaintiff by his defence and counterclaim denied the claim and sought for a DNA test to be carried out to prove that he was the biological father. The plaintiff also at the same time filed an originating summons in the Shah Alam High Court for a DNA test. The originating summons was later withdrawn. On 11 March 2020, the plaintiff filed a similar application which was also subsequently withdrawn.

E [9] Six days later, on 17 March 2021, the plaintiff's counterclaim for a DNA test was struck out for non-compliance with an order for payment of security for costs made in the writ action. This prompted the plaintiff to file a motion in the Federal Court to seek for a review of the adoption order. On 6 July 2021, the Federal Court dismissed the motion.

F [10] Undeterred, the plaintiff on 14 July 2021, filed an application in the Shah Alam Sessions Court for leave to intervene to set aside the adoption order on the ground that the order had been made without his knowledge and consent. The learned Sessions Judge struck out the application with no liberty on the ground that she was *functus officio* and had no jurisdiction to set aside the order.

G [11] The plaintiff then filed the present OS in the Kuala Lumpur Family High Court on 2 September 2021. On the application of the defendants, the OS was subsequently transferred to the Shah Alam High Court and ordered to be heard together with the writ action. The plaintiff now applies for the OS to be heard first and a decision made on the basis of the affidavit evidence filed in support and opposition. The defendants oppose the said application.

H [12] Against that background, I now turn to the parties' submissions.

**[20]** Kes *JKL v. ABC & Anor* (*supra*) juga melibatkan isu berkaitan Akta Pengangkatan 1952 dan terdapat juga keterangan yang menyatakan bahawa ibu kepada kanak-kanak tersebut tidak mengetahui siapakah bapa kandung kanak-kanak tersebut. Mahkamah Tinggi telah membenarkan permohonan

I untuk permohonan untuk ujian DNA tersebut.

**[21]** Dalam hal ini mahkamah berpendapat perintah untuk membenarkan permohonan ujian DNA bagi mengesahkan nasab perlu dilakukan secara berhati-hati. Ini adalah disebabkan terdapat undang-undang yang berkaitan dengan perkahwinan terutamanya berkaitan dengan orang Islam yang mempunyai kerangka undang-undang keluarga dan prinsip-prinsip berkaitan nasab yang perlu diberikan perhatian. Misalnya di dalam Enakmen Undang-Undang Keluarga Islam 2005 Negeri Pahang yang memperuntukkan seperti berikut:

**Seksyen 111. Siapakah yang dikaitkan sebagai bapa**

Jika seseorang perempuan yang berkahwin dengan seseorang lelaki melahirkan seorang anak lebih daripada enam bulan qamariah dari tarikh perkahwinannya itu atau dalam masa empat tahun qamariah selepas perkahwinannya itu dibubarkan sama ada oleh sebab kematian lelaki itu atau oleh sebab perceraian, dan perempuan itu pula tidak berkahwin semula, maka lelaki itu hendaklah disifatkan sebagai bapa anak itu, tetapi lelaki itu boleh, dengan cara li'an atau kutukan, menafikan anak itu sebagai anaknya di hadapan Mahkamah.

**Seksyen 112. Kelahiran lebih empat tahun selepas pembubaran perkahwinan**

Jika anak itu dilahirkan lebih daripada empat tahun qamariah selepas perkahwinan itu dibubarkan sama ada oleh sebab kematian lelaki itu atau oleh sebab perceraian, lelaki itu tidak boleh disifatkan sebagai bapa anak itu melainkan jika lelaki itu atau mana-mana warisnya menegaskan bahawa anak itu adalah anak lelaki itu.

**[22]** Sebagai contoh seorang lelaki yang mengadakan perhubungan seks dengan seorang wanita kurang daripada enam bulan dan kemudian melangsungkan perkahwinan sehingga anak yang dikandung oleh wanita tersebut telah dilahirkan dalam tempoh perkahwinan tersebut. Jika berlaku pertikaian kepada nasab tersebut maka ujian DNA akan dijalankan dan keputusannya adalah positif untuk menunjukkan bahawa lelaki tersebut adalah bapa kandung kepada kanak-kanak tersebut. Sedangkan di bawah s. 111 Enakmen Undang-Undang Keluarga Islam 2005 Negeri Pahang kanak-kanak tersebut adalah tidak boleh dianggap sebagai anak kepada lelaki tersebut. Ia akan memberi kesan kepada hak kanak-kanak tersebut kepada harta pusaka si mati sekiranya lelaki tersebut meninggal dunia ataupun akan timbul isu berkaitan perwalian kanak-kanak tersebut sekiranya dia perempuan yang memberikan kesan kepada keesahan perkahwinan kelak.

**[23]** Pada masa yang sama mahkamah juga meneliti Convention On The Right Of The Child iaitu melalui General Assembly Resolution 44/25 yang berkuat kuasa pada 2 September 1990 telah memperincikan berkenaan hak kanak-kanak yang perlu diberikan perlindungan seperti di art. 3 iaitu:

A Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

B 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

C 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

D **[24]** Malahan semasa Malaysia menandatangani konvensyen tersebut terdapat pengecualian terhadap art. 7 resolution 7.1 seperti yang dinyatakan dalam kes *CAS v. MPPL & Anor* [2019] 2 CLJ 454 perenggan 34 seperti berikut:

[34] We are mindful that Malaysia made a reservation against article 7(1) of the UNCRC. The said reservation reads:

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> The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 1, 2, 7, 13, 14, 15, [...], 28, [paragraph 1 (a)] 37, [...] of the Convention and declares that the *said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia*.

F

(penekanan ditambah)

**[25]** Di dalam kes ini apa yang jelas daripada afidavit yang dikemukakan oleh pihak pemohon di perenggan 27 afidavit sokongan beliau adalah berkaitan dengan hasrat beliau untuk berpisah dengan responden pertama. Ia juga disebabkan tindakan responden pertama yang dikatakan cuba memisahkan pemohon dengan anak lelaki beliau. Di samping itu, responden pertama juga dikatakan tidak membenarkan pemohon berhubung dengan anak-anak beliau.

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H **[26]** Adalah didapati bahawa kanak-kanak dalam kes ini adalah berumur dalam lingkungan 8, 7 dan 6 tahun. Peguam pemohon menyatakan bahawa permohonan ini perlu dibuat untuk memastikan bahawa kebajikan kanak-kanak tersebut terjamin dengan mengetahui siapakah bapa kandung mereka. Oleh itu, demi kepentingan kebajikan kanak-kanak tersebut, sewajarnya permohonan untuk ujian DNA bagi menentukan nasab kanak-kanak tersebut dibenarkan.

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**[27]** Sebaliknya, peguam responden pertama berhujah bahawa permohonan ini adalah semata-mata untuk kepentingan pihak pemohon. Ia tiada berkaitan dengan kepentingan kanak-kanak tersebut. Apa yang ditegaskan oleh peguam responden pertama ialah bantahan keras terhadap permohonan untuk mahkamah ini mengarahkan agar Pejabat Pendaftaran Kelahiran dan Kematian mengeluarkan nama responden pertama sebagai bapa di dalam catatan sijil kelahiran kanak-kanak tersebut setelah mendapati bahawa laporan DNA kelak mengesahkan bahawa responden pertama bukannya bapa kandung kepada kanak-kanak tersebut. Mahkamah berpendapat permohonan pihak pemohon tersebut untuk pendaftar kelahiran untuk mengambil tindakan sewajarnya adalah tidak dapat dielakkan ekoran daripada keputusan yang diperolehi daripada keputusan DNA tersebut. Ini adalah berdasarkan kepada panduan oleh Mahkamah Persekutuan dalam kes *Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran Dan Kematian Malaysia, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 CLJ 23 seperti berikut:

> [53] Following the DNA results and more particularly, the order of court declaring the appellant as the biological father of the child, it cannot be now said that the information pertaining to the father of the child is or remains, unavailable or "tidak diperolehi". The information is since known and made available through the order of court. Quite rightly and in keeping with the duties and obligations of maintaining a public record of births which is reliable and can be relied on, the Registrar-General cannot refuse the new information. It would make no sense for the Registrar-General to maintain a record or register where the information on the father of the child is now inaccurate or untrue. On the contrary, in the face of the declaratory order, the Registrar-General would be failing in his statutory duties in not correcting the records in relation to the child's father.
>
> [54] When approached with the latest information (as set out in the declaratory order of court), the Registrar-General ought to have facilitated the correction or alteration as he is empowered to do so under s. 27. Correcting the records in the instant case would by no means render the information when first recorded at the time of birth of the child as inaccurate. Neither can it be suggested to run contrary to the interests or rights of the second respondent as mother of the child as accorded under s. 13. That right remains intact as under s. 27(3), while "any error of fact or substance in any register may be corrected by entry", this is "without any alteration of the original entry". Hence, the issue of interference with the mother's rights and the matter of whether she was under an obligation to provide the name or details of the father of the child, does not arise.
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> [55] The decision in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* [2011] 3 CLJ 722 was cited to us in support of the proposition that the particulars in the register can and ought to be corrected to reflect the appellant as the biological father of the child. In that case, an illegitimate child was adopted by his mother's sister who had converted when she married a

Muslim. The appellant, the natural father of the child as confirmed by tests, learnt of the adoption and also that another man's name was entered as the child's father. The appellant filed an application challenging the validity of the adoption and conversion of the child while at the same time requesting that he be declared the biological father of the child, and that the Registrar-General rectifies the relevant registers to name him as the father of the child. The High Court allowed the appellant's declarations that he is the natural father of the child and that the register be appropriately rectified. The remaining orders were dismissed. On appeal, the decision of the High Court was affirmed. However, the Court of Appeal went further to set aside the declaration and the order to rectify.

**[28]** Mahkamah mendapati apa yang menarik dalam kes ini ialah seperti yang dinyatakan oleh kedua-dua pihak bahawa tiada undang-undang khusus berkenaan bidang kuasa mahkamah untuk mengarahkan seseorang menjalankan ujian DNA untuk menentukan nasab. Ia berbeza dengan undang-undang di United Kingdom, misalnya terdapat dalam s. 23 Family Law Reform 1987 seperti berikut:

23 Provisions as to scientific tests

(1) For subsections (1) and (2) of section 20 of the [1969 c. 46.] Family Law Reform Act 1969 (power of court to require use of blood tests) there shall be substituted the following subsections:

(1) In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction-

(a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and

(b) for the taking, within a period, specified in the direction of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;

and the court may at any time revoke or vary a direction previously given by it under this subsection.

(2) The person responsible for carrying out scientific tests in pursuance of a direction under subsection (1) above shall make to the court a report in which he shall state:

(a) the results of the tests;

(b) whether any party to whom the report relates is or is not excluded by the results from being the father or mother of the person whose parentage is to be determined; and

(c) in relation to any party who is not so excluded, the value, if any, of the results in determining whether that party is the father or mother of that person;

and the report shall be received by the court as evidence in the proceedings of the matters stated in it.

(2A) Where the proceedings in which the parentage of any person falls to be determined are proceedings on an application under section 56 of the [1986 c. 55.] Family Law Act 1986, any reference in subsection (1) or (2) of this section to any party to the proceedings shall include a reference to any person named in the application.

(2) In section 25 of that Act (interpretation of Part III):

(a) for the definitions of "blood samples" and "blood tests" there shall be substituted the following definition:

"bodily sample' means a sample of bodily fluid or bodily tissue taken for the purpose of scientific tests;"; and

(b) after the definition of "excluded" there shall be inserted the following definition:

"scientific tests' means scientific tests carried out under this Part of this Act and made with the object of ascertaining the inheritable characteristics of bodily fluids or bodily tissue.

**[29]** Ia telah dipinda seperti berikut:

23 Provisions as to scientific tests.

(1) For subsections (1) and (2) of section 20 of the Family Law Reform Act 1969 (power of court to require use of blood tests) there shall be substituted the following subsections:

(1) In any civil proceedings in which the parentage of any person fails to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction:

(a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and

(b) for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;

and the court may at any time revoke or vary a direction previously given by it under this subsection.

(2) The [individual] carrying out scientific tests in pursuance of a direction under subsection (1) above shall make to the court a report in which he shall state:

(a) the results of the tests;

(b) whether any party to whom the report relates is or is not excluded by the results from being the father or mother of the person whose parentage is to be determined; and

A (c) in relation to any party who is not so excluded, the value, if any, of the results in determining whether that party is the father or mother of that person;

and the report shall be received by the court as evidence in the proceedings of the matters stated in it.

B (2A) Where the proceedings in which the parentage of any person fails to be determined are proceedings on an application under section [55A or 56] of the Family Law Act 1986, any reference in subsection (1) or (2) of this section to any party to the proceedings shall include a reference to any person named in the application.

C (2) In section 25 of that Act (interpretation of Part III):

(a) for the definitions of "blood samples" and "blood tests" there shall be substituted the following definition:

"bodily sample" means a sample of bodily fluid or bodily tissue taken for the purpose of scientific tests;" and

D (b) after the definition of "excluded" there shall be inserted the following definition:

"scientific tests" means scientific tests carried out under this Part of this Act and made with the object of ascertaining the inheritable characteristics of bodily fluids or bodily tissue.

E **[30]** Selain daripada itu di United Kingdom juga terdapat peruntukan yang membenarkan mahkamah membuat pengisytiharan berkenaan nasab. Ini dapat dilihat di bawah s. 55A Family Law Act 1986 seperti berikut:

55A Declarations of parentage.

F (1) Subject to the following provisions of this section, any person may apply to the High Court [or the family court] for a declaration as to whether or not a person named in the application is or was the parent of another person so named.

(2) A court shall have jurisdiction to entertain an application under G subsection (1) above if, and only if, either of the persons named in it for the purposes of that subsection:

(a) is domiciled in England and Wales on the date of the application, or

H (b) has been habitually resident in England and Wales throughout the period of one year ending with that date, or

(c) died before that date and either:

(i) was at death domiciled in England and Wales, or

I (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

(3) Except in a case falling within subsection (4) below, the court shall refuse to hear an application under subsection (1) above unless it considers that the applicant has a sufficient personal interest in the determination of the application (but this is subject to section 27 of the Child Support Act 1991).

(4) The excepted cases are where the declaration sought is as to whether or not:

(a) the applicant is the parent of a named person;

(b) a named person is the parent of the applicant; or

(c) a named person is the other parent of a named child of the applicant.

(5) Where an application under subsection (1) above is made and one of the persons named in it for the purposes of that subsection is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child.

(6) Where a court refuses to hear an application under subsection (1) above it may order that the applicant may not apply again for the same declaration without leave of the court.

(7) Where a declaration is made by a court on an application under subsection (1) above, the prescribed officer of the court shall notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration.

**[31]** Malahan di United Kingdom terdapat Blood Test (Evidence of Paternity) Regulation 2001 bagi memperincikan ujian DNA yang berkaitan. Persoalan yang timbul adalah bagaimanakah mahkamah perlu meneliti kepada suatu permohonan untuk ujian DNA dijalankan bagi tujuan nasab. Mahkamah Rayuan di United Kingdom telah menyatakan di dalam kes *Re F (A Minor) (Blood Tests: Parental Rights)* [1993] 3 All ER 596 dan juga dalam kes *Re E (Parental Responsibility: Blood Tests)* [1995] 1 FLR 392 di mana Balcomb LJ menyatakan seperti berikut:

There are at the moment no civil proceedings in which the child H's paternity falls to be determined other than the application by the father himself for such blood tests to be taken. In my judgment (and this indeed is the effect of the case of *Re F (A Minor) (Blood Tests: Parental Rights)* [1993] Fam 314, sub nom *Re F (A Minor: Paternity Test)* [1993] 1 FLR 598), the order directing a blood test to be taken can only be made in proceedings to which an ancillary matter, namely paternity, arises; for example if the father had applied for contact with H, or if the mother had (which she has not) applied for financial provision from the father in respect of H, then those would be proceedings in which the question of H's paternity would arise. But it seems to me clear from the decision of this court in *Re F* (above) that there is no jurisdiction to make a free-standing order for directing blood tests to be taken to determine paternity.

**[32]** Fakta dalam kes *Re F (A Minor) (Blood Tests: Parental Rights)* (*supra*) menunjukkan bahawa perintah ujian DNA untuk mengesahkan sama ada dia adalah bapa atau bukan kepada kanak-kanak tersebut. Ini adalah berkaitan dengan satu perintah tanggungjawab keibubapaan yang berkaitan. Begitu juga dalam kes *S v. S* [1970] 3 All ER 107.

*Penggunaan Bidang Kuasa Sedia Ada Mahkamah (Inherent Jurisdiction)*

**[33]** Pada masa yang sama mahkamah juga perlu menimbangkan sama ada permohonan ini boleh diberikan atas bidang kuasa sedia ada mahkamah (inherent jurisdiction). Ini adalah disebabkan tiadanya peruntukan bertulis di bawah Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 serta undang-undang bertulis yang lain berkenaan bidang kuasa mahkamah untuk mengarahkan ujian DNA bagi tujuan pengesahan nasab. Mahkamah meneliti keputusan dalam kes *Spencer v. Anderson And Others* [2017] 2 All ER 846. Dalam kes tersebut permohonan telah dikemukakan untuk suatu ujian DNA terhadap suatu mayat yang telah menjalani *post mortem* bagi tujuan menentukan nasab. Persoalan yang timbul dalam kes tersebut ialah ketiadaan peruntukan untuk suatu ujian DNA dilakukan kepada mayat yang menjalani *post mortem*. Apa yang ada ialah peruntukan undang-undang yang membenarkan ujian DNA dibuat bagi tujuan untuk nasab sekiranya seseorang itu masih hidup. Hakim Peter Jackson di Mahkamah Tinggi menyatakan seperti berikut:

> [71] In my view, the following features are relevant to the existence or non-existence of an inherent power:
>
> (1) Statutory interpretation
>
> Before the enactment of the FLRA, the preponderant judicial opinion was that there was power to direct the taking of blood to establish a child's paternity, and such orders were on occasion made: see *Re L (an infant)* [1968] 1 All ER 20, [1968] P 119 and *BRB v. JB* [1968] 2 All ER 1023, [1968] P 466.
>
> The FLRA is the only statute concerned with testing for evidence of biological relationships. It is comprehensive in relation to cases falling within its scope: Re O. In that case, the issue that had arisen lay squarely within the scheme of the Act. It fell under what Wall J referred to ([2000] 2 All ER 29, [2000] Fam 139) as the 'rug' of the legislation, or what Hale LJ referred to as the 'footprint' in the Court of Appeal in *Re R* [2005] 4 All ER 433, [2005] 2 AC 621(see para [39] of the House of Lords' opinions). In contrast, the testing of DNA *post-mortem* falls distinctly outside the scope of the legislation. The FLRA cannot be read purposively or Convention-compliantly so as to cover cases of the present kind. I therefore do not accept that a power to give directions for *post-mortem* DNA testing has been ousted by the Act.

Nor do I accept that the court's powers are limited by s. 19(2) of the Senior Courts Act 1981. This formal, descriptive sub-section cannot be taken to have defined or circumscribed the powers of the High Court, or to have frozen them as at the date of the legislation. Were it otherwise, the vulnerable adult jurisdiction could not have existed.

There is a legislative void, both in relation to *post-mortem* paternity testing and in relation to paternity testing using extracted DNA. I accept that in an area of this kind, policy considerations arise which would be better regulated by Parliament than by individual decisions of the court. In one sense, this speaks for judicial reticence. However, there is no indication that Parliament has turned its attention to the situation that arises in the present case, or that it is likely to do so at any early date. This gives rise to the possibility of an indefinite period during which individuals would be left without a remedy.

(2) Consent

Both the FLRA and the HTA (and the HFEA 1990 and 2008, insofar as they may be analogous) regard consent as the central component of lawfulness.

It is necessary, when considering the availability of a remedy after death, to consider the situation that would have arisen in life. The person concerned would have had the right to decide whether or not to participate in paternity testing and to allow his human tissue to be used for that purpose.

Although neither the FLRA nor the HTA apply to extracted DNA as opposed to human tissue, the use of human tissue is a necessary forerunner to the extraction of DNA and similar considerations and sensitivities must apply when DNA testing is being considered.

If the issue related to the *post-mortem* testing of human tissue (as opposed to DNA), the terms of the HTA would apply. For testing to be lawful, there would have to have been consent from the individual in life or by a relative after death. Or there would have to be a court order.

(3) The public interest

An intervention of the kind suggested in this case might give rise to uncertainty and concern within the medical world and beyond at the possibility that such orders might be made in other cases, or that in effect the door was being opened to *post-mortem* paternity testing on demand. Although it does not arise in the present case, the prospect of applications for exhumation cannot be regarded as fanciful when one recalls the circumstances in *Mortensen (15 June 2006, unreported) and Jaggi* (2006) 47 EHRR 702, or indeed those of Richard III.

Against this, there is no sign that the present application has caused alarm to the major hospital involved in the present case (indeed it appears to welcome the court's assistance), or that applications of this kind are likely to be at all numerous, particularly if they could only be

heard in the High Court, and thereby be subject to very close scrutiny. The prospect of this limited development in the law affecting the behaviour of the patient population as a whole is likely to be more imaginary than real.

(4) Identity

Knowledge of our biological identity is a central component of our existence. The issue can have consequences of the most far- reaching kind, perhaps above all for those who do not know or are not sure of their parentage. Within our lifetimes, DNA testing has made the truth available. At the same time, it has made all other kinds of evidence almost irrelevant. While it remains possible to reach a conclusion about paternity without scientific tests, the practical and psychological consequences are different. A declaration made without testing is a finding, while the result of a test is a fact.

The contrast can be found in the opinion of Lord Wilberforce in the *Ampthill Peerage Case* [1976] 2 All ER 411, [1977] AC 547: 'Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book.'

While he said ([1976] 2 All ER 411, [1977] AC 547):

> One need not, perhaps, on this occasion, face the question whether, when technology or science makes an advance, so as to enable to be known with certainty that which previously was doubtful, such evidence ought to be admitted in order to destroy the binding force of a judgment or of a declaration with statutory force. It may be that within the limits within which a new trial may be ordered and, on the precedents, those limits are comparatively short, such evidence could be admitted for that purpose.

The European Convention, as interpreted in *Jaggi*, underscores the importance of the opportunity to discover one's parentage. Although the Convention cannot on its own create a remedy, it is desirable that our law is consistent with the approach taken in other jurisdictions if that is possible.

(5) The interests of others

It is a peculiar feature of genetic testing that it inescapably has the potential to affect not only the individual being tested but also those to whom he is closely related. Depending on the facts, the rights of surviving relatives may be engaged, but it is difficult to envisage a situation in which the establishment of the truth about biological relationships could amount to an unlawful interference with those rights; at the very least any interference may be necessary and proportionate. The rights of third parties certainly cannot represent an absolute bar to the existence of an inherent power.

(6) The interests of justice

When all is said and done, the court is faced with a civil dispute that must be resolved. In cases where a power exists, it has long been emphasised that the establishment of the truth is both a goal in itself and a process that serves the interests of justice. As noted above, where a court makes findings of fact based upon witness and documentary testimony, there is always the possibility of error. Evidence will be incomplete because (by definition in a case of the present kind) people will have died and memories may have faded. When dealing with matters as important as parentage, the need to reach the right conclusion is obvious. The prospect of a court trying to ascertain the truth to the best of its ability when the truth is in effect there for the asking is a troubling one. Account must also be taken of the needless waste of resources that would accompany a trial involving narrative evidence.

(7) The range of circumstances

The existence of a power cannot depend upon the circumstances of the particular case. What is relevant is the range of cases that might arise. It is possible to envisage opportunistic and unmeritorious applications, but there might equally be applications, perhaps concerning young children, where the need to know the truth about parentage is compelling. The answer cannot be that the court can consider an application in the second case but not in the first: jurisdiction cannot depend on merits.

[72] Reflecting the complexity of the legal and ethical issues, the above features pull in a number of different directions. If the only considerations related to the interests of the deceased and the public interest, the arguments against the existence of an inherent power would surely prevail. However, the interests of the living and the interests of justice must also be brought into consideration.

[73] Taking all these matters into account, my conclusion is that the High Court does possess an inherent jurisdiction that it can properly deploy to direct scientific testing to provide evidence of parentage in circumstances falling outside the scope of the FLRA. If the court was unable to obtain evidence of this kind, severe and avoidable injustice might result. Awareness of the implications of ordering testing without consent and of the wider public interest does not lead to the conclusion that the jurisdiction does not exist, but rather to the realisation that it should be exercised sparingly in cases where the absence of a remedy would lead to injustice.

...

[78] I accordingly find that Mr Spencer's interest in knowing his biological parentage, the questions raised by the medical history, and the marked advantages of scientific testing as a means of resolving both issues, collectively carry more weight in the particular circumstances of this

A case than the counter-indicators to testing that undoubtedly exist. It is in the interests of justice that testing should take place, and it is a proper exercise of the court's inherent jurisdiction to secure this outcome.

[79] For completeness I would add that, had testing not been directed, the court would have heard the evidence in the normal way. Statutory
B inferences could not be drawn in a case where the statute did not apply, but this would not have prevented the court from drawing whatever inferences seemed proper from the evidence before it.

**[34]** Kes ini telah disahkan oleh Mahkamah Rayuan di United Kingdom dalam kes *Spencer v. Spencer And Others* [2018] 3 WLR 972 seperti berikut:

C 49. The judge carefully considered all the legal and ethical factors which related to the issue as to whether what he intended to do amounted to a principled extension of the use of inherent jurisdiction. Having weighed up those matters the judge decided, not that the best interests of justice on the facts of this case required a finding that there was jurisdiction, but
D that the interests of the living in knowing their biological identity together with the interests of justice including the desirability of knowing the truth, when set against the other identified considerations, led to the conclusion that the High Court possessed the jurisdiction to make the order sought.

50. In my judgment the judge was entirely correct in both his approach and in his conclusion that there is a residual power under the inherent
E jurisdiction for a court to make a direction that the extracted DNA of Mr Anderson should be utilised in order for the paternity of the applicant to be determined.

51. In so concluding, it goes without saying that I wholly endorse Hayden J's stricture that the inherent jurisdiction is not a "lawless void", and I
F would adopt the words of Peter Jackson J in his judgment in the present case [2016] Fam 391, para 60 that:

> the need for predictability in the law speaks for caution to be exercised before the inherent jurisdiction is deployed in new ways. The court is bound to be cautious, weighing up whether the
G existence of a remedy is imperative or merely desirable, and seeking to discern the wider consequences of any development in the law.

**[35]** Apakah penggunaan bidang kuasa sedia ada dalam kes di United Kingdom tersebut boleh diterima pakai dalam konteks peruntukan di negara ini bagi membolehkan perintah untuk ujian DNA dibuat bagi tujuan nasab
H di dalam kes ini. Bagi memahami perkara tersebut, maka mahkamah perlu melihat bidang kuasa sedia ada hanya boleh digunakan sekiranya tidak terdapat undang-undang yang berkaitan dengannya. Ini telah dinyatakan oleh Mahkamah Persekutuan dalam kes *Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep)
I 244; [1988] 1 MLJ 178 di mana Mahkamah Persekutuan menyatakan bahawa bidang kuasa sedia ada akan digunakan untuk menghalang ketidakadilan atau penyalahgunaan proses seperti berikut:

Order 92 rule 4 R.H.C. provides: A

4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers. B

**[36]** Apa yang jelas ialah bidang kuasa sedia ada tidak boleh digunakan sewenang-wenangnya melainkan terdapat keadaan yang memerlukan penggunaan kuasa sedia ada tersebut bagi menghalang ketidakadilan atau penyalahgunaan proses mahkamah. C

**[37]** Hakikat bidang kuasa sedia ada mahkamah telah dinyatakan dalam artikel *The Inherent Jurisdiction of the Court,* IH Jacob di dalam Current Legal Problems [1970] 23, di mana di halaman 24 yang telah merumuskan hakikat bidang kuasa sedia ada seperti berikut: D

Perhaps the true nature of the inherent jurisdiction of the court is not a simple one but is to be found in a complex of a number of features, some of which may be summarised as follows: E

(1) The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.

(2) The distinctive and basic feature of the inherent jurisdiction of the court is that it is exercisable by summary process, *ie*, without a plenary trial conducted in the normal or ordinary way, and generally without waiting for the trial or for the outcome of any pending or other proceeding. F

(3) Because it is part of the machinery of justice, the inherent jurisdiction of the court may be invoked not only in relation to the litigant parties in pending proceedings, but in relation also to any one, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties. G

(4) The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed. H I

A

(5) The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

B

**[38]** Malahan, jika dilihat kepada kes *Re F (A Minor) (Blood Tests: Parental Rights)* (*supra*) telah dinyatakan bahawa perintah untuk ujian DNA bagi tujuan nasab hanya boleh dibuat sekiranya terdapat prosiding apabila nasab menjadi isu yang dipertikaikan. Ia hanya dapat diselesaikan melalui ujian DNA bagi penentuan nasab tersebut.

C

**[39]** Di dalam kes ini, mahkamah mendapati bahawa tiada prosiding lain di mahkamah ini di mana persoalan nasab adalah menjadi isu dalam tindakan tersebut. Apa yang ada di dalam kes ini ialah tindakan pihak pemohon untuk suatu ujian DNA oleh responden pertama semata-mata. Oleh itu, mahkamah berpendapat ia tidak sesuai untuk mahkamah ini menggunakan bidang kuasa sedia ada bagi mengarahkan suatu ujian DNA dibuat bagi tujuan penentuan nasab kerana tiada apa-apa prosiding yang ada seperti petisyen perceraian atau perintah penjagaan atau perintah-perintah lain yang melibatkan isu nasab.

D

E

**Adakah Mahkamah Boleh Menggunakan Bidang Kuasa Sedia Ada Yang Dikenali Sebagai *Parens Patriae***

**[40]** *Parens patriae* adalah merupakan bidang kuasa yang timbul di dalam pemerintahan King Edward 1 daripada tahun 1272 hingga 1307. Bidang kuasa ini merujuk kepada kuasa raja untuk menjadi pelindung kepada kanak-kanak dan orang yang tidak sempurna akal. Ini telah dinyatakan misalnya dalam kes *Mr Justice Eyre v. Countess of Shaftsbury* [1722] 24 ER 659 seperti berikut:

F

G

> The King is bound of common right, and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the King's protection, for which reason it is, that idiots and lunatics, who are uncapable to take care of themselves, are provided for by the King as pater patrice, and there is the same reason to extend this care to infants. (But the cases of lunatics and infants are distinguished by Lord Hardwicke, in *ex parte* Whitfield, 2 Atk. 315. So *ex parte* Phillips, 19 Ves. 118.)

H

**[41]** Hakikat *parens patriae* telah dinyatakan dengan jelas oleh Lord Chancellor John Somers seperti berikut dalam kes *Bertie v. Faulkland* [1696] 23 ER 814; *Viscount Falkland v. Bertie And Others* [1558-1774] All ER Rep 396:

I

> In this court are several things that belonged to the King at pater patriae, and fall under the care and direction of this court, where the interests of infants are so far regarded and taken care of that no decree shall be made against an infant without a day being given him to show cause after he comes of age.

(Perbincangan lanjut dapat dilihat dalam rencana oleh Lawrence B Custer, *The Origins of the Doctrine of Parens Patriae, 27 EMORY LJ 195 (1978)* dan *The Origins and Evolution of the Parens Patriae Jurisdiction oleh The Honorable Justice Paul L G Brereton AM RFD, Lecture on Legal History*, Sydney Law School, 5 May 2017)

**[42]** Adalah jelas bahawa bidang kuasa *parens patriae* itu adalah berkaitan dengan hak dan tanggungjawab pemerintah di England untuk memberikan perlindungan kepada kanak-kanak, orang yang tidak sempurna akal dan orang yang safih. Oleh itu, adalah tidak sesuai untuk bidang kuasa *parens patriae* ini disamakan dengan bidang kuasa sedia ada mahkamah. Ia adalah suatu doktrin yang diamalkan di United Kingdom dan tidak semestinya terpakai di dalam bidang kuasa mahkamah di negara ini. Mahkamah berpendapat ia tidak boleh dijadikan sandaran untuk satu perintah ujian DNA bagi tujuan penentuan nasab di dalam kes ini.

**Pemakaian Undang-undang Lazim United Kingdom**

**[43]** Adalah tidak dapat dinafikan bahawa apa-apa prinsip undang-undang yang terpakai di United Kingdom boleh digunakan di negara ini. Ia bersesuaian dengan peruntukan di bawah s. 3(1) Akta Undang-undang Sivil 1956 seperti berikut:

> 3 Application of U.K. common law, rules of equity and certain statutes
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

(2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

(3) Without prejudice to the generality of paragraphs (1)(b) and (c) and notwithstanding paragraph (1)(c):

(i) it is hereby declared that proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of the High Court by way of *habeas corpus* or for an order of mandamus, an order of prohibition, an order of certiorari or for an injunction restraining any person who acts in an office in which he is not entitled to act, shall be available in Sabah to the same extent and for the like objects and purposes as they are available in England;

(ii) the Acts of Parliament of the United Kingdom applied to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak [Cap. 2] and specified in the Second Schedule of this Act shall, to the extent specified in the second column of the said Schedule, continue in force in Sarawak with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and, in particular, subject to the modifications set out in the third column of the said Schedule.

**[44]** Namun demikian pemakaian prinsip undang-undang di United Kingdom tersebut perlulah dilakukan dengan berhati-hati bersesuaian dengan s. 3(1) Akta Undang-undang Sivil 1956 tersebut dan juga garis panduan yang dinyatakan di dalam kes *Nepline Sdn Bhd v. Jones Lang Wootton* [1995] 1 CLJ 865. Dalam kes tersebut Mahkamah Tinggi telah menyatakan pendekatan yang perlu digunakan dalam menerima pakai undang-undang di United Kingdom sekiranya terdapat lompongan (*lacunae*) di dalam undang-undang. Hakim Mahkamah Tinggi menyatakan seperti berikut:

In my view the approach that the Court should take is first to determine whether there is any written law in force in Malaysia. If there is, the Court need not look anywhere else. If there is none, then the Court should determine what is the common law of, and the rules of equity as administered in, England on 7 April 1956. Having done that the Court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the Court should apply it. If not, I am of the view that, the Court is free to reject it totally or adopt any part which is "permissible", with or without qualification. Where the Court rejects it totally or in part, then there being no written law in force in Malaysia, the Court is free to formulate Malaysia's own common law. In so doing, the Court is at liberty to look at any source of law, local or otherwise, be it common law of, or the rules of equity as administered in England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia. Under the provision of s. 3 of the Civil Law Act, 1956, I think, that it is the way the Malaysian common law should develop.

**[45]** Dalam kes *Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors* [1990] 1 LNS 80 mahkamah telah memperingatkan kepentingan untuk mengguna pakai undang-undang lazim (common law) prinsip-prinsip ekuiti dan statut yang mempunyai pemakaian umum hanya boleh digunakan di Malaysia sekiranya jika ia bersesuaian dengan penduduk dan tertakluk kepada keadaan tempatan yang memerlukannya. la dinyatakan seperti berikut:

> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.
>
> I ought to emphasise the proviso to s. 3(1)(a). I concluded that the practice in West Malaysia described above, combined with the statutory provisions of the Road Traffic Ordinance 1958 in regard to the registration of ownership claim, would constitute such a distinctive local circumstance of the local inhabitants of West Malaysia that the decision of *Moorgate* [1977] AC 890 and other cases directly and indirectly on the point of failure to have an ownership claim registered should not be followed. We have to develop our own common law just like what Australia has been doing by directing our minds to the 'local circumstances' or 'local inhabitants'.

**[46]** 50 tahun yang lalu, pandangan telah dikemukakan berkenaan dengan pemakaian undang-undang Inggeris di Malaysia melalui artikel oleh *Professor Ahmad Ibrahim The Civil Law Ordinance in Malaysia* [1971] 2 MLJ Iviii seperti berikut:

> It is clear that as the law is developed in Malaysia through legislation and judicial decisions, there will be less and less need to rely on the English law to fill *lacunae* in the law. Perhaps the time has come to consider whether another method of filling in *lacunae* in the law should not be adopted to recognise the fact that Muslim law is the law of the land in Malaysia.

**[47]** Mahkamah ini juga dipandu oleh Mahkamah Persekutuan dalam isu ini dalam kes *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 seperti berikut:

> [37] It is not the function of the court to enter into arguments regarding the desirability or otherwise of the provision. That is a matter for Parliament to decide. As far as the court is concerned, until now, that is the law and the court is duty bound to apply it. In so doing, the provision is clear that even the application of common law of England as administered in England on 7 April 1956 is subject to the conditions that no provision has been made by statute law and that it is "permissible" considering the "circumstances of the States of Malaysia" and their

A "respective inhabitants". That is not to say that post – 7 April 1956 developments are totally irrelevant and must be ignored altogether. If the court finds that the common law of England as at 7 April 1956, is not "permissible", it is open to the court to consider post – 7 April 1956 developments or even the law in other jurisdictions or sources.

B [38] The point I am making, if I may borrow the words of Hashim Yeop A. Sani, Chief Justice (Malaya) in *Chung Khiaw Bank Ltd.* (*supra*) is that "We cannot just accept the development of the common law of England". We have to "direct our mind to the "local circumstances" or "local inhabitants", "to quote the words of Peh Swee Chin J in *Syarikat Batu Sinar Sdn Bhd & 2 Ors* (*supra*).

C **[48]** Dalam kes *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* (*supra*) mahkamah telah menyatakan:

[30] Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there
D is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia. Having done that the court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the court
E should apply it. If not, in my view, the court is free to reject it totally or adopt any part which is "permissible", with or without qualification. Where the court rejects it totally or in part, then the court is free to formulate Malaysia's own common law. In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England after 7 April 1956 and principles of common law in other
F countries.

[31] In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers
G and judges alike do not see the rational of Malaysian courts applying "archaic" common law of England which reason, in law, is difficult to justify. As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly in their
H judgments the effects of that provision. For example, in *Syarikat Batu Sinar Sdn. Bhd. & 2 Ors. v. UMBC Finance Bhd. & 2 Ors.* [1990] 2 CLJ 691; [1990] 3 CLJ (Rep) 140 Peh Swee Chin J (as he then was) referring to the proviso to s. 3(i) said: We have to develop our own Common law just like what Australia has been doing, by directing our mind to the "local circumstances" or "local inhabitants".

I

**[49]** Pematuhan yang ketat kepada s. 3(1) Akta Undang-undang Sivil 1956 adalah penting bagi membolehkan perkembangan undang-undang tidak bergantung semata-mata kepada undang-undang lazim di United Kingdom. Mahkamah Agong dalam kes *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 telah menyatakan hubungan s. 3 Akta Undang-undang Sivil 1956 dengan perkembangan undang-undang di negara ini seperti berikut:

> Section 3 of the Civil Law Act 1956 directs the Courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the Courts of this country. We cannot just accept the development of the common law in England. See also one of the majority judgments in *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 at p. 40.

**[50]** Jika ditinjau kepada sejarah pengenalan undang-undang Inggeris di negara ini adalah didapati bahawa keadaan setempat dan adat resam diambil kira dalam pengenalan undang-undang Inggeris, *Yeap Cheah Neo And Others Appellants; And Ong Cheng Neo respondents. On Appeal From The Supreme Court Of The Straits Settlement, In Its Division Of Penang* (1875) LR 6 PC 381. Dalam kes tersebut telah dinyatakan oleh Majlis Privy seperti berikut:

> With reference to this history, it is really immaterial to consider whether Prince of Wales' Island, or, as it is now called, Penang, should be regarded as ceded or newly-settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. This would be the case in a country newly settled by subjects of the British Crown; and, in their Lordships' view, the charters referred to, if they are to be regarded as having introduced the law of England into the colony, contain in the words "as far as circumstances will admit," the same qualification. In applying this general principle, it has been held that statutes relating to matters and exigencies peculiar to the local condition of England, and which are not adapted to the circumstances of a particular colony, do not become a part of its law, although the general law of England may be introduced into it. Thus it was held by Sir W Grant that the Statute of Mortmain was not of force in the island of Grenada (*Attorney-General v. Stewart (1)*). The subject is discussed at large in *Mayor of Lyons v. East India Company (2).*

**[51]** Ia juga telah dinyatakan dalam kes *Khoo Hooi Leong Appellant; And Khoo Chong Yeok respondent. On Appeal From The Supreme Court Of The Straits Settlements (Penang)* [1930] AC 346 seperti berikut:

> The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which

A would ensue if that law were applied to alien races unmodified. That was the view expressed by Sir Peter Maxwell C.J. in *Choa Choon Neo v. Spottiswoode (4)*; and this Board, in *Yeap Cheah Neo v. Ong Cheng Neo (5)*, stated that in Sir Peter Maxwell's judgment "the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the Colony are B correctly stated.

**[52]** Begitu juga ia ditegaskan di dalam kes *Leonard v. Nachiappa Chetty* [1923] 4 FMLSR 265 di mana Hakim Reay JC menyatakan seperti berikut:

Before reliance can be placed on English decisions, particularly decisions C on points of procedure, it is necessary in the first instance to examine carefully our local law and to ascertain what it is and in what respects it resembles or differs from the English law. This seems a self evident proposition, but it is nevertheless too often overlooked by counsel.

**[53]** Di dalam kes *Choa Choon Neoh v. Spottiswoode* [1869] 1 KY 216 D Maxwell CJ menyatakan seperti berikut:

In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general [and not merely local] policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such moditifications as are necessary to E prevent it from operating unjustly and oppressively on them.

Majlis Privy juga mengutarakan sentimen yang sama dalam menyatakan bahawa mahkamah perlu mengambil kira keadaan tempatan sebelum membawa masuk undang-undang Inggeris ke negeri-negeri di Tanah Melayu ketika itu. Ini dinyatakan dalam kes *Hj Abdul Rahman v. Mohamed Hassan* F [1917] AC 209.

**[54]** Penelitian kepada sejarah perundangan Malaysia adalah jelas menunjukkan hakim-hakim Inggeris di Tanah Melayu dan Negeri-negeri Selat begitu berhati-hati dalam menerima masuk prinsip undang-undang G lazim United Kingdom dan prinsip ekuiti dengan mengambil kira kesesuaiannya dengan keadaan tempatan, keadaan penduduk-penduduk tempatan serta adat resam masyarakat. Pendekatan sedemikian telah membolehkan sebahagian daripada prinsip undang-undang Inggeris diubahsuai agar ianya serasi dengan keadaan tempatan sehingga mengukuhkan pentadbiran kehakiman Inggeris di Tanah Melayu dan Negeri- H negeri Selat. Hakim-hakim Inggeris ketika itu sentiasa diingatkan oleh mahkamah-mahkamah atasan sama ada Mahkamah Rayuan atau Majlis Privy supaya memberikan perhatian yang utama kepada keadaan setempat sebelum menerima pakai prinsip undang-undang di Tanah Melayu dan Negeri-negeri Selat. Oleh yang demikian, acap kali didapati prinsip undang-undang Inggeris I tersebut yang diamalkan di United Kingdom adalah berbeza dengan apa yang diamalkan di Tanah Melayu dan Negeri-negeri Selat. Apa yang jelas mahkamah perlu berhati-hati dalam menerima pakai prinsip undang-undang

di United Kingdom dan prinsip ekuiti bagi memastikan tiada berlaku pertembungan dengan keadaan tempatan dan adat resam masyarakat setempat. Di samping ia juga bertujuan untuk mengelakkan sebarang keresahan sosial dalam pelaksanaan undang-undang tersebut. Amalan ini sewajarnya diteruskan di dalam menerima pakai undang-undang dari United Kingdom atau bidang kuasa common law yang lain. Ini bagi memastikan kelestarian undang-undang negara ini dapat dipertahankan.

**[55]** Pemahaman keadaan masyarakat sekeliling dan keperluan untuk memahami undang-undang tempatan adalah penting bagi membolehkan pelaksanaan undang-undang tersebut dapat dilaksanakan sesuai dengan kehendak masyarakat, budaya dan adat resam tempatan. Jika undang-undang daripada United Kingdom diterima masuk tanpa melalui panduan di bawah s. 3(1) Akta Undang-undang Sivil 1956 dan juga pendekatan dalam kes *Nepline Sdn Bhd v. Jones Lang Wootton* (*supra*) ia akan menjadikan sistem perundangan akan terus menerima pakai undang-undang United Kingdom tanpa terlebih dahulu mencari peruntukan-peruntukan di dalam undang-undang tempatan dan sekiranya dimasukkan undang-undang lazim di United Kingdom tersebut ke dalam sistem perundangan tempatan ia haruslah bersesuaian dengan masyarakat tempatan. Jika ini tidak diberikan perhatian ia akan menjadikan undang-undang lazim di United Kingdom tersebut tidak secocok dengan keadaan masyarakat tempatan yang akhirnya akan menimbulkan kegawatan pentafsiran undang-undang dan pelaksanaannya.

**[56]** Oleh itu, pada hemat mahkamah berdasarkan kepada autoriti-autoriti di atas mahkamah perlu berhati-hati dalam menerima pakai undang-undang lazim daripada United Kingdom atau prinsip-prinsip ekuiti dengan mengambil perhatian kepada perkara-perkara berikut:

(i) Mahkamah perlu meneliti sama ada terdapat undang-undang bertulis di Malaysia berkaitan dengan undang-undang berkenaan. Mahkamah perlu meneliti ss. 3, 5 dan 6 Akta Undang-undang Sivil 1956.

(ii) Mahkamah perlu meneliti peruntukan undang-undang yang membenarkan penggunaan undang-undang lazim di England misalnya di bawah s. 47 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 yang menyatakan seperti berikut:

> **47 Principles of law to be applied**
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> Subject to the Provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings."

Begitu juga misalnya di dalam s. 5 Kanun Prosedur Jenayah (KPJ) yang menyatakan seperti berikut:

> **5 Laws of England, when applicable**
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> As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

(iii) Pemakaian prinsip undang-undang lazim di United Kingdom tersebut hendaklah bersesuaian dengan keadaan dan adat resam tempatan seperti yang dinyatakan di dalam provisor s. 3(1) Akta Undang-undang Sivil 1956.

(iv) Mahkamah juga perlu meneliti bahawa prinsip-prinsip yang hendak diguna pakai tidak bercanggah dengan kerangka undang-undang di negara ini terutamanya Perlembagaan Persekutuan serta undang-undang bertulis yang lain.

**[57]** Senarai di atas bukannya sesuatu yang tuntas namun ia boleh memastikan bahawa penerimaan masuk prinsip undang-undang lazim (common law) di United Kingdom dan juga daripada bidang kuasa undang-undang lazim (common law) yang lain tidak akan menjejaskan keadilan dan menimbulkan kegusaran di dalam masyarakat ekoran daripada pengimportan prinsip undang-undang yang asing daripada budaya dan adat resam masyarakat tempatan. Dalam konteks ini, mahkamah merujuk kepada rencana oleh Tun Arifin bin Zakaria bekas Ketua Hakim Negara *A Matter of Justice: Selected Articles and Speeches*, The Malaysian Current Law Journal 2017 dalam artikelnya bertajuk *Judicial Attitudes Towards Malaysian Common Law Post-1956* setelah memetik pandangan DYMM Sultan Azlan Shah dalam ucapan awam yang dianjurkan oleh Institut Jurutera-Jurutera Malaysia yang dilaporkan dalam surat khabar New Straits Times, 02 April 1989 menyatakan seperti berikut:

> Sultan Azlan Shah elucidated his perception of the Malaysian common law thus:
>
> Any reference to the common law in Malaysia must necessarily mean the common law of Malaysia which over the years had been applied in the country as part of the laws of Malaysia. Although in the early years of development Malaysian law might have relied on English law by virtue of the Civil Law Act, this was no longer the position. Although English law was applied when the Civil Law Act was first introduced in 1878 to the Straits Settlements on the grounds that there was no local law applicable, it was not applied blindly or in toto and was relevant only to the extent that it was made subject to modifications and adopted to suit local conditions. Once applied through this process, it became Malaysian Law.

> Therefore, His Royal Highness concluded that over the past one hundred years or so, through the judicial process, almost every branch of the law was developed in Malaysia and in some areas legislation was introduced.
>
> This alternative definition of Malaysian common law therefore subsumes and appropriates as its own, all judge-made law which has been pronounced in Malaysia, notwithstanding that the genesis or primary rationale for such law emanates from the English common law or other sources. Thus the debate rages on.
>
> For myself it must be said, particularly for the purpose of this lecture, that it is the latter definition or expression of Malaysian common law that is significant.

**[58]** Oleh itu, dalam kes ini mahkamah berpendapat peruntukan di bawah undang-undang keluarga di United Kingdom berkaitan dengan kuasa mahkamah untuk memerintahkan ujian DNA untuk penentuan nasab adalah tidak boleh diguna pakai. Ini adalah disebabkan penerimaan undang-undang tersebut adalah tidak sesuai dengan keadaan dan adat resam di negara ini. Pemakaiannya akan menimbulkan kekeliruan serta mengancam sistem undang-undang keluarga yang berada di negara ini sama ada Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 dan Enakmen Keluarga Islam di negeri-negeri.

**[59]** Mahkamah juga berpendapat adalah terpulang kepada kebijaksanaan badan perundangan untuk memutuskan sama ada perlu digubal atau dipinda undang-undang bagi memberikan bidang kuasa kepada mahkamah untuk memerintahkan ujian DNA bagi tujuan penentuan nasab. Ia bersesuaian dengan pandangan Mahkamah Rayuan di dalam kes *Mahisha Sulaiha Abdul Majeed v. Ketua Pengarah Pendaftaran & Ors And Another Appeal* [2022] 8 CLJ 697; [2022] 5 MLJ 194 iaitu isu-isu sensitif yang melibatkan kontroversi moral dan sosial adalah sewajarnya diputuskan oleh badan perundangan. Mahkamah Rayuan menyatakan seperti berikut:

> It is reiterated here that matters concerning sensitive and controversial moral and social issues are inherently legislative questions, calling for the representatives of the general body of citizens to decide on them. The parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas.

**[60]** Mahkamah berpendapat isu berkenaan penggunaan ujian DNA bagi menentukan nasab bukannya suatu masalah perundangan yang boleh diputuskan dengan hanya berdasarkan kepada undang-undang yang diamalkan di negara lain. Ini adalah disebabkan ia melibatkan isu undang-undang keluarga yang dikuatkuasakan di Malaysia termasuklah undang-undang kekeluargaan Islam di bawah Enakmen Keluarga Islam di negeri-negeri. Begitu juga isu ini membabitkan nilai dan prinsip moral yang menjadi pegangan pihak-pihak tertentu di dalam negeri ini. Oleh itu, ia lebih sesuai

A diputuskan oleh badan perundangan setelah mengadakan perundingan dengan pihak-pihak yang berkepentingan bagi mengelakkan sebarang kontroversi berkenaan perkara tersebut. Ini adalah disebabkan keputusan berkenaan nasab sesesorang akan membawa kesan kepada hak untuk mendapatkan harta pesaka, hak perwalian dan perkara-perkara lain yang melibatkan hukum
B agama di dalam masyarakat yang perlu diberikan perhatian.

**Kesimpulan**

**[61]** Berdasarkan kepada afidavit-afidavit yang difailkan oleh pihak-pihak mahkamah berpendapat bahawa permohonan pemohon di dalam kes ini adalah ditolak. Ia adalah disebabkan kes ini tidak sesuai untuk digunakan
C budi bicara sedia ada mahkamah, prinsip *parens patriae* tidak wajar digunakan dalam kes ini. Di samping itu, prinsip undang-undang keluarga dalam bidang kuasa lain berkaitan dengan nasab tidak sesuai digunakan dalam sistem perundangan negara ini untuk memutuskan kes ini.

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